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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM LEE ELIJAH, SR. et al.,

Defendants and Appellants.

2d Crim. No. B229741
(Super. Ct. No. 1345874)
(Los Angeles County)

William Lee Elijah, Sr. (Elijah) and Charlotte Garrett (Garrett) appeal from the judgments of conviction following their joint jury trial. The jury convicted Garrett of one count of selling cocaine base (Health & Saf. Code, § 11352, subd. (a)),¹ and convicted Elijah of three counts of selling cocaine base and one count of possession for sale of cocaine base (§§ 11352, subd. (a); 11351.5). In a bifurcated proceeding, the trial court found true allegations that Elijah had served a prior prison term (Pen. Code, § 667.5, subd. (b)), and suffered a prior felony conviction of possession for sale of a controlled substance (§§ 11370.2, subd. (a); 11351.5). The court sentenced him to state prison for 11 years 8 months, and awarded him 649 days of presentence custody credits.

¹ All statutory references are to the Health and Safety Code unless otherwise stated.

It suspended the imposition of Garrett's sentence, and granted her probation for five years.

Elijah and Garrett contend that the trial court abused its discretion by admitting evidence of a 2008 incident involving the seizure of rock cocaine, a digital scale and packaging materials from Garrett's apartment, while Elijah was present. Elijah also challenges the admission of his prior conviction of possession for sale of cocaine base. We conclude that the court properly admitted the challenged evidence pursuant to Evidence Code sections 1101, subdivision (b), and 352.

Elijah further contends, and the People concede, that he is entitled to three additional days of presentence credits. We shall order the judgment amended accordingly. In all other respects, we affirm the judgments as to Elijah and Garrett.

BACKGROUND

December 2009 and January 2010 Cocaine Transactions

In December 2009 and January 2010, police informant Andrew Green worked with Santa Maria Police Department (SMPD) and Santa Barbara County Sheriff's Department (SBSD) officers as a paid undercover buyer in "controlled buys" of cocaine. Right before each buy, the officers searched Green and his vehicle, and provided him with recorded money to buy cocaine. They also met with him immediately after each buy.

SPSD Detective Neil Gowing and SMPD Detective Joe Lopez directed Green to order a quantity of rock cocaine from Elijah. Lopez kept Green and Elijah under surveillance on December 29, 2009, January 11, 2010, and January 25, 2010, for several hours each day. Green testified at trial, along with other witnesses. Defense counsel impeached Green with prior convictions, including several misdemeanor thefts, and a felony possession for sale of cocaine base.

Elijah's December 29, 2009, Sales of Cocaine Base (Counts 1 and 2)

On December 29, 2009, in the presence of Lopez, Green called Elijah in the afternoon and said that he wanted to buy a quarter ounce of rock cocaine. Elijah called

Green later and said to meet him at McDonald's. Green went to McDonald's, but Elijah was not there. Green again called Elijah, who sent him to a liquor store, across the street. When he reached the liquor store, a woman later identified as Christina Webb approached, entered Green's truck, and told him to drive. She gave him 4.8 grams of rock cocaine. Green gave Webb \$350, and drove her back to the liquor store.

On December 29, at approximately 8:30 p.m., Green again called Elijah. He told him that he wanted to buy a larger quantity of cocaine, and that he wanted to do business only with Elijah. Elijah told Green to go to a market. When Green arrived, Elijah was not there. He called Elijah, who directed him to go to a residence. Elijah met Green in front of the residence and entered his truck. Green gave Elijah \$700. Webb was there, also. She placed 17.3 grams of rock cocaine on Green's scale. Green wore a wire to record the transaction that evening.

Elijah's and Garrett's January 11, 2010, Sale of Cocaine Base (Count 3)

On January 11, 2010, Green called Elijah and told him he wanted to buy four pieces of rock cocaine. They agreed to meet in Lompoc, at a market. Lopez and Vega followed Green to Lompoc. When Green reached the market, Elijah was not there. Green was about to leave after waiting a long time, when Elijah called and sent him to a nearby Auto Zone. Green went there, but Elijah did not. He called Elijah, who approached and entered Green's truck. They counted Green's money, and Elijah told him to drive to a nearby Taco Bell. While Green drove, Elijah gave directions to someone on the phone.

Green dropped off Elijah at the Auto Zone. A short while later, Elijah was walking with Garrett in an alley. They both entered Taco Bell. Three or four minutes later, Elijah left Taco Bell, walked toward Green's truck and got in. He gave Green 20.5 grams of rock cocaine. Green handed Elijah the money. Elijah returned to Taco Bell.

Elijah's January 25, 2010, Possession for Sale of Cocaine Base (Count 4)

On January 25, 2010, Green called Elijah about buying rock cocaine. They agreed to meet at the Santa Maria Wal-Mart. Elijah went outside Wal-Mart, and

approached Green's truck. They walked to Wal-Mart and returned to Green's truck. Elijah walked to a different section of the parking lot and directed Green to meet him there. Elijah got back in the truck and put 14.2 grams of cocaine on a scale. Green flashed the money and gave the detectives a signal. Within a minute, six to eight detectives approached Green's truck. As detectives dragged both men from the truck, Elijah tossed a small bindle of rock cocaine (.5 grams) at Green.

DISCUSSION

Admission of Appellants' Prior Conduct

We reject appellants' contention that the trial court abused its discretion in admitting evidence of the circumstances surrounding her arrest with Elijah on November 6, 2008. At about 11:00 a.m. that day, several SBSO officers, including Gowing and Detective Christopher Gotschall, executed a search warrant on her small one-bedroom, one-bathroom apartment. They knocked and gave notice. Hearing no response, they forcibly opened the door to enter.

Upon entering, the officers saw Elijah standing in front of the bathroom door. They found a 38-gram piece of rock cocaine at the bottom of the bathroom toilet bowl, a digital scale in the tub, and a razor blade on the bathroom floor. They detained Elijah, who had two cell phones.

The kitchen table held small cocaine rocks, a digital scale lid, and a torn black plastic bag. Cocaine sellers wrap cocaine in plastic, and tie it in a package called a "tear off." The collective weight of cocaine recovered from Garrett's apartment was about 42 grams, which would yield about 420 doses of cocaine.

The officers entered the bedroom and found Garrett in bed. She said that she had been asleep. They found a box of clear sandwich bags and a pink cell phone in the bed area. The cell phone had several messages. Gotschall recalled one message about Pepsi, one that said something like, "Hey, I've got five dollars," and another that said something like, "What meth?" The bedroom closet contained a glass pipe and a scouring pad, items used to smoke cocaine.

In 2008, the prosecution charged both appellants with possession for sale of cocaine base (§ 11351.5), and charged Elijah alone with possession for sale of a controlled substance (§ 11351). The charges were dismissed to avoid disclosing the identity of a confidential informant. Gowing opined that the cocaine base seized from Garrett's apartment in 2008 was possessed for sale. The court admitted the testimony regarding the 2008 incident because it was relevant to appellants' knowledge of the nature of the cocaine base and their intent to sell it, and to dispel any suggestion of an accident or mistake concerning Garrett's presence at the Taco Bell on January 11, 2010.

Elijah further contends that the trial court abused its discretion by admitting his January 1991, conviction of possession for sale of cocaine base. (§ 11351.5.) The court admitted that evidence because it was relevant to show Elijah's knowledge concerning, and intent to sell, the cocaine base in 2009 and 2010.

"[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) But, "evidence that a person committed a crime, civil wrong, or other act" is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

The admission of prior act evidence under Evidence Code sections 1101 and 352 is "essentially a determination of relevance" that is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195.) A trial court's ruling will be affirmed on appeal unless it is arbitrary, capricious, or otherwise falls outside the bounds of reason. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, abrogated on another point as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

When appellant Elijah was arrested in 2010, he responded to a detective's query about rock cocaine by saying that he "didn't know nothing about that." His knowledge of the nature of the cocaine was at issue. (See *People v. Pijal* (1973) 33 Cal.App.3d 682, 691; see also *People v. Catlin* (2001) 26 Cal.4th 81, 146 [a not guilty plea puts all elements of a charged offense in issue].) Gowing participated in the 2008 seizure of rock cocaine and packaging materials from Garrett's apartment. Gowing concluded that the cocaine was possessed for sale. The seizure of rock cocaine from Garrett's apartment, in Elijah's presence, was highly relevant to both parties' intent to sell. (*Pijal*, at p. 691.)

Garrett argues that the seizure of cocaine from her apartment in 2008 was not relevant to her intent because she was asleep in another room at the time of the seizure. This argument ignores key facts -- the apartment was small; Elijah did not live there; officers found cocaine and packaging items in rooms that Garrett would necessarily use (the bathroom and kitchen); and they also found packaging items (empty plastic bags) in or near the bed where she said she had been sleeping. Garrett further claims that the 2008 evidence concerning the seizure of cocaine from her apartment was particularly prejudicial where the evidence of her participation in the January 11, 2010 offense against her was scant and circumstantial. We disagree. Elijah was in Green's truck to sell cocaine, but he had no cocaine with him. Within a short time, Green heard Elijah give directions to someone on his cell phone; Elijah got out of Green's truck; Elijah and Garrett were in a nearby alley; Elijah and Garrett entered Taco Bell together; a few minutes later, Elijah returned to Green's truck with 20.5 grams of cocaine.

Appellants also argue that the absence of similarities between the charged transactions and those associated with the 2008 cocaine seizure rendered evidence of that seizure particularly prejudicial. This argument is not persuasive. "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.'" [Citations.]'" (*People v. Ewoldt* (1994) 7 Cal. 4th 380, 402.) The challenged

evidence met that criterion. Among other things, the 2008 case involved the same substance (cocaine base) and many of the same parties as the instant case. (Garrett was charged only in count 3 but Elijah was named in every count of the instant case.) In addition, the amount of cocaine base seized from Garrett's apartment in 2008 was substantial, as were the amounts involved in the instant offenses.

The record supports the trial court's discretionary determination that the probative value of the evidence of appellant's prior conduct outweighed its prejudicial impact. In addition, the court instructed the jury concerning the limited to use to which it could put evidence of appellants' prior conduct. We presume that the jury followed the court's instructions. (*People v. Beach* (1983) 147 Cal.App.3d 612, 625.)

Elijah's Penal Code Section 4019 Credits

Elijah argues, and respondent concurs, that he is entitled to three days of additional presentence credits. The court awarded him a total of 649 days presentence custody credit, including 325 days of actual custody credit, and 324 days of conduct credits.

Under the version of Penal Code section 4019 applicable to his sentence, Elijah is entitled to receive two days of conduct credit for every two days of actual custody (§ 4019, former subs. (b)(1), (c)(1) & (f)).) The parties agree that the trial court erred in calculating Elijah's actual days of presentence custody. He was remanded on January 25, 2010, and committed to state prison on December 16, 2010. Thus, he served 326 days of presentence custody between and including those dates. Because Elijah served 326 days of custody, before sentencing, he is entitled to 326 days of presentence conduct credit, for a total of 652 days of presentence credit.

DISPOSITION

The judgment as to Elijah is modified to award him 652 days of presentence credits: 326 days for actual custody and 326 days for conduct. (Pen. Code, § 4019.) The trial court shall amend the abstract of judgment accordingly and transmit a

certified copy to the Department of Corrections. In all other respects, the judgments as to Elijah and Garrett are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Edward H. Bullard, Judge
Superior Court County of Los Angeles

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